IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No.....

THE ATLANTIC REFINING COMPANY,
Petitioner,

vs.

JAMES B. BERRY SONS COMPANY, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Court below.

The opinion of the District Court is reported in 14 F. Supp. 891 appearing at pages 628-634 of the record. The three opinions of the Circuit Court of Appeals are reported in 106 F. (2d) 644, 647 and 650, respectively, and appear at pages 660b, 660v and 660nn of the record. The *per curiam* opinion of the Circuit Court of Appeals denying plaintiff's petition appears at page 660 rrr of the record.

Jurisdiction.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. §347), and under Section 262 of the Judicial Code, Act of March 3, 1911 (28 U. S. C. §377). The case is within the jurisdiction of the Court as to subject matter, since it arises under the patent laws. The decision and order sought to be reviewed were entered February 28, 1940.

Cases believed to sustain jurisdiction are:

As to grant of writ of certiorari for providing relief from a void decree:

American Construction Co. v. *Jacksonville T. & K. W. R. Co.; Same* v. *Pennsylvania Co. for Insurance on Lives and Granting of Annuities,* 148 U. S. 372, 386-8 (1892);
Amedee D. Moran, et al., v. *Charles Dillingham,* 174 U. S. 153 (1899), and
Rexford v. *Brunswick-Balke-Collender Co.,* 228 U. S. 339 (1913).

As to review predicated upon an order ruling upon an application for the vacating of a decree:

Benjamin D. Harris v. *William Hardeman, et al.,* 14 How. (55 U. S.) 334, 338 (1852);
Stevirmac Oil & Gas Company v. *C. E. Dittman, et al.,* 245 U. S. 210, 211, 214 (1917);
Swift & Company, et al., v. *United States of America,* 276 U. S. 311, 322-3 (1928).

Specification of Errors to be urged.

The errors which Petitioner will urge, if the Writ of Certiorari is allowed are—

1. The Third Circuit Court of Appeals erred in refusing to vacate its purported order of September 27, 1939 and its purported mandate of January 8, 1940, and in failing to recall the said mandate and issue a mandate based upon its order of December 21, 1938.

2. The Third Circuit Court of Appeals erred in refusing to vacate the purported order of September 27, 1939,

reversing its earlier order, there being no legally effective judgment of a majority of the court sustaining the said purported order.

3. The Third Circuit Court of Appeals erred in refusing to vacate the purported order, where the court at the time of entering the said purported order was equally divided and one of the two judges constituting the court filed an opinion dissenting therefrom on the merits, but at the same time joined in authorizing the entry thereof.

Summary of Argument.

In point of legal effect Judge Dickinson did not participate in the decision on second rehearing below.

The joinder of a dissenting judge in authorizing the entry of an order cannot give legal effect to that order where it is not, in fact, based upon the judgment of a majority of the court.

The legal effect of the equal division of the court below on second rehearing was to leave the case *in statu quo* and to leave in force the previous order of the court entered December 21, 1938.

It was the duty of the court below to vacate the purported order of September 27, 1939, since on the facts appearing in its *per curiam* opinion of February 28, 1940 the purported order is void in point of law.

ARGUMENT.

Point 1. In point of legal effect Judge Dickinson did not participate in the decision on second rehearing below.

On September 27, 1939, when the court below purported to perform its judicial function in deciding the case on second rehearing by the filing of opinions of Judges Biggs

and Buffington and the entry of the purported order affirming the decree below, Judge Dickinson's power to participate in that judicial function had already terminated by reason of his death.[1] Prior to the actual filing on that date, no one of the judges was bound by anything that had been said or written concerning decision of the case on second rehearing. Their opinions were locked in their own bosoms and could be revised or reversed at will. They had no legal force or effect upon any one.[2]

Prior to Judge Dickinson's death whatever had been written was, at most, a draft opinion having no force in law. After his death there was no longer a majority of the court in favor of any opinion. Neither of the opinions subsequently filed was in legal effect the opinion of the court. They were the individual opinions of the judges filing them, and each was entitled to equal respect.

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[1] *Freeman on Judgments*, 5th Ed. §58; *Wilson* v. *Rodenwald*, 61 Miss. 228, 232-233; *Wyman* v. *National Broadway Bank*, 59 Howard's Pr. Rep. 331, 331-3 (N. Y. 1880); *Commissioners of Highways* v. *Drainage Commissioners*, Second District Appellate Court, Illinois, Gen. No. 5828, Opinion filed July 31, 1914, reported in abstract only, 188 Ill. App. 6; *Broder* v. *Conklin*, 98 Cal. 360, 362, 363; 33 P. 211, 212-3; *Connolly* v. *Ashforth*, 98 Cal. 205, 206; *Ellis* v. *Rector*, 32 Mich. 378, 379; *Cain* v. *Libby*, 32 Minn. 491, 492; *Marcellus* v. *Wright*, 61 Mont. 274, 285.

[2] Opinions of judges are subject to their revision and reversal and are not binding upon any one until rendered or made of record, *Houston* v. *Williams*, 13 Cal. 24, 27 (Opinion by Judge Field, later Mr. Justice Field); *Anglo-Californian Bank* v. *Mahoney Mining Co.*, 1 Fed. Cases 919, 920; *Judson, et al.*, v. *Gage*, 98 Fed. 540, 542-3; and are "until then * * * but a purpose in the breast of the judge which could be changed as he might determine", *Broder* v. *Conklin*, 98 Cal. 360, 364.

The notation at the end of Judge Biggs' opinion that Judge Dickinson participated therein could no more alter the legal effect than it could resurrect the deceased judge or extend his term of office that had expired by act of God.

In legal effect Judge Dickinson did not participate in the decision. His power to break the tie died with him.

Point 2. The joinder of a dissenting judge in authorizing the entry of an order cannot give legal effect to that order where it is not, in fact, based upon the judgment of a majority of the court.

The entry of an order is a purely ministerial act that may be performed by any judge of the court provided it is supported by the requisite majority decision of the judges of the court.[3] But there must first be a valid judgment of the court, *i.e.*, a majority decision of the judges, before any ministerial act in respect of a judgment is effective, for what is adjudged by the court, not what is entered, constitutes the judgment,[4] and the power or authority behind a judgment, rather than the result reached, determines its validity and immunity from attack.[5] An order unsupported by a valid judgment is an "illegal thing" which should be removed from the record.[6]

The joinder of a dissenting judge in authorizing the entry of such an order does not make it effectual in law, for it is the duty of courts to decide cases according to the judicial conscience of the judges and not according to

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[3] *Dohany* v. *Rogers*, 281 U. S. 362, 369; *Freeman, Judgments* (5th Ed.) §46.

[4] *Freeman, Judgments* (5th Ed.) §§46, 47; *Myers* v. *Consumers Coal Co.*, 212 Pa. State Rep. 193, 200.

[5] *Freeman, Judgments* (5th Ed.) §§333, 354.

[6] *Summers* v. *Kramer*, 271 Pa. 189, 195-6.

their actions contrary to conscience.[7] In the matter of *Kings County Elevated Railroad Company,* 78 N. Y. 383, 385 (1879), the court said of a case where only two judges were present, although the third transmitted in writing his concurrence with one of those judges:

> "A single member can decide nothing, and an assent of one where two only are present, that a judgment may be entered, in which he does not concur, but from which he dissents, is not sufficient to render such judgment effective."

Point 3. The legal effect of the equal division of the court below on second rehearing was to leave the case *in statu quo* and to leave in force the previous order of the court entered December 21, 1938.

It is settled law of the State of Pennsylvania, in which this litigation arose, that where a court is equally divided, a motion or rule before it falls and the case remains *in statu quo.*[8] Since, under modern authority, the granting of

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[7] "The court has no more moral or judicial right to violate the sanctity of its own conscience than it has to violate the rules of law. When a question is addressed to discretion, the obligations of conscience are as imperious as those of law when the question is addressed to the law. And if a party is successful in convincing the conscience of the court, that justice, consistently with the rules of law, requires the interposition of its discretionary action, he is as much entitled to it, as when he claims the benefit of the positive rules of law, and the court is as much bound to render that justice which he asks." *Goddard* v. *Coffin,* 10 Fed. Cas. 505, 509.

[8] *Madlem's Appeal,* 103 Pa. 584, 586-7; *Summers* v. *Kramer,* 271 Pa. 189, 194-6; *First Congressional District Election,* 295 Pa. 1, 12-13; and see *Carmichael* v. *Eberle,* 177 U. S. 63 (1900); *Goddard* v. *Coffin,* 10 Fed. Cas. 505, at p. 508.

a motion for rehearing does not set aside the former judgment of a court or vacate the entry thereof,[9] the equal division of the court, on rehearing as to a judgment of reversal previously entered, leaves that judgment in force and does not result in affirming the judgment of the lower court.[10]

Point 4. It was the duty of the court below to vacate the purported order, since on the facts appearing in its *per curiam* opinion of February 28, 1940 the purported order is void in point of law.

The *per curiam* opinion, here sought to be reviewed, shows that the judges below, though equally divided, purported to effect a result that could only be valid and legally effective if based upon the judgment of a majority of the court, a judgment which did not exist. The judges either singly or together were without power or jurisdiction to effect this result, contrary to the conscience and expressed opinion of the dissenting judge. Being without power or authority, under the existent circumstances, to render the judgment contained in the purported order of September 27, 1939, it was the duty of the court below to vacate the same upon petitioner's application.[11] Their refusal to vacate the void order constituted such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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[9] *Kieckhefer Box Co.* v. *John Strange Paper Co.*, 180 Wis. 367, 392; *White* v. *Crandall*, 105 Fla. 70, 90; 4 *Corpus Juris Secundum*, 2043, §1446.

[10] *Florida Motor Lines* v. *Hill*, 106 Fla. 33; 143 So. 261, at pages 262, 263; 4 *Corpus Juris Secundum*, 2048, §1451.

[11] *Freeman, Judgments*, 5th Ed. §226, and see cases cited on page 8, *supra*.

CONCLUSION.

Since the *per curiam* opinion of the court below, given in support of its refusal to vacate the void order, has now disclosed the entire lack of legal basis for the order, the Petitioner respectfully prays that this court exercise its power of supervision so that the injustice of the decision below in decreeing a result contrary to the unanimous judgments previously rendered, may be reviewed and corrected in accordance with law.

Respectfully,

THEODORE S. KENYON,
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EDGAR F. BAUMGARTNER,
Counsel for Petitioner.

Dated, New York, N. Y.,
May 24, 1940.